Nos. 91-155 and 91-339

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC. and BRIAN RUMBAUGH,
Petitioners and Cross Respondents

v.

WALTER LEE, SUPERINTENDENT OF PORT AUTHORITY POLICE,
Respondent and Cross Petitioner

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICI CURIAE OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION; ADVANCE PUBLICATIONS, INC.; GANNETT CO., INC.; GLOBE NEWSPAPER COMPANY; THE NEW YORK TIMES COMPANY; AND THE WASHINGTON POST IN SUPPORT OF PETITIONERS

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PRELIMINARY STATEMENT

Amici curiae submit this brief, on consent of all parties, in support of Petitioner International Society for Krishna Consciousness, Inc. ("ISKCON"). At issue in this case is the extent to which the First Amendment

protects expressive activities within the public areas of airport terminals controlled by the Port Authority of New York and New Jersey.

In its Cross-Petition for Certiorari, the Port Authority contends that the court below held that the airport terminals were not public fora. Cross-Petition for Writ of Certiorari at i, 11. However, the Second Circuit did not address that issue:

> In our recent decision in International Soc'y for Krishna Consciousness, Inc. v. Lee, 925 F.2d 576 (2 Cir. 1991), we did not reach the issue of whether airport terminals are traditional, designated, or non-public fora.

Longo v. United States Postal Service, —— F.2d ——, 1992 U.S. App. LEXIS 280, page 5 (2d Cir. 1992).

Should this Court nevertheless choose to decide the public forum issue, *amici* urge it to hold that Newark, LaGuardia and JFK airports are traditional public fora, suitable for "communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.). Whatever the mode of analysis undertaken by the Court, however, *amici* request it to take into account the following discussion.

INTEREST OF THE AMICI CURIAE

Amici are newspaper publishers and a trade association that represent the entire spectrum of newspaper companies in the United States. On an average day, the newspapers represented by *amici* circulate to more than 56 million readers.

Today, more newspaper readers rely on "single-copy" purchases, as opposed to home-delivered newspaper subscriptions, than ever before. Each day, thousands upon thousands of airport travelers, employees and visitors

buy a newspaper at airports throughout the nation. *Amici*'s ability to reach those readers adequately, and thus to sustain the "flow of information . . . to the public," *Frisby v. Schultz*, 487 U.S. 474, 486 (1988), depends in significant part upon the airports' status as public fora.

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION ("ANPA") is a non-profit trade association representing approximately 1,300 member newspapers. Its membership constitutes about 90 percent of the total daily and Sunday newspaper circulation, and a substantial portion of the non-daily newspaper circulation, in the United States. Because airport circulation reaches those readers who might not otherwise receive a newspaper, ANPA's members have a keen interest in judicial decisions, such as that of the court below, which relate directly or indirectly to newspaper distribution.

ADVANCE PUBLICATIONS, INC., directly and through subsidiary corporations, publishes newspapers in twenty-two cities throughout the United States, publishes thirteen magazines with nationwide circulation, operates sixteen cable systems across the country, and owns a major national book publishing company. These companies distribute their publications extensively at airports. Advance Publications, Inc. has found that many thousands of people who travel through, congregate in or work at the nation's airports purchase news and other written information there.

GANNETT CO., INC. and its subsidiaries publish 81 daily, and a variety of non-daily, newspapers. Total circulation of the daily newspapers amounts to over 6.2 million, of which 38%, or about 2.4 million, are single-copy sales.

THE WASHINGTON POST, published in the District of Columbia by The Washington Post Company, is a daily newspaper of general circulation, averaging about 800,000 daily circulation and 1.1 million Sunday circulation.

Approximately twenty-five percent of the *Post's* daily sales are through single-copy outlets.

THE NEW YORK TIMES COMPANY publishes *The New York Times* and 32 other daily or weekly newspapers. Of *The New York Times'* 1,114,830 daily circulation, approximately 51% are sold as single-copy.

GLOBE NEWSPAPER COMPANY, publishes *The Boston Globe*, a newspaper of general circulation that circulates in the Boston metropolitan area. During the six months ending in September of 1991, the *Globe's* average paid daily circulation was 504,675, of which 38% was attributable to single-copy sales.

KNIGHT-RIDDER, INC. is parent to 25 newspapers with a combined daily circulation of 3,555,338. Out of that, single-copy sales amount to 34.8%, or 1,237,848 readers on a daily basis. Philadelphia Newspapers, Inc. publishes *The Philadelphia Inquirer* and the *Philadelphia Daily News*, and both are members of the Knight-Ridder group. The *Daily News* is sold almost entirely in single-copy purchases. The combined average daily circulation of both newspapers is 711,639, and of that 537,429, or 75%, of their readers obtain the newspapers by single-copy sales.

SUMMARY OF ARGUMENT

Since pre-Revolutionary times, newspaper readers have been able to buy newspapers on the streets and in other public passageways. The ability freely to distribute along such public thoroughfares, including contemporary air terminals, is more than ever crucial to the survival of newspapers, and depends upon the protections afforded by the public forum doctrine.

Open without restriction to the public, major air terminals are communities in their own right, in which broad ranges of commercial and expressive activities take

place. The Port Authority air terminals are accordingly public fora, in which governmental interests and First Amendment activities can be accommodated by the enforcement of appropriate time, place or manner regulations.

ARGUMENT

POINT I

MAJOR AIRPORT TERMINALS ARE ESSENTIAL LOCATIONS FOR THE DISTRIBUTION OF NEWSPAPERS AND ARE PUBLIC FORA

The right to distribute the news is indispensable to the freedom of the press, and is fully protected by the First Amendment:

> Liberty of circulating is as essential to that freedom [of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value.

In re Jackson, 96 U.S. 727, 733 (1878). The right to distribute finds support not only in the press' right to publish, but also in the public's right to receive information. *Martin v. Struthers*, 319 U.S. 141, 143 (1943). Constitutional protection is undiminished by the fact that a newspaper is sold, rather than given away. *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647 (1981). "It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge." *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943).

Since the earliest days of this nation, newspapers have been sold to readers on a day-by-day basis, now commonly referred to as "single-copy" sales. Single-copy sales are essential to the survival of newspapers, and have long been an integral part of the daily pattern of activity in airport terminals. It is therefore appropriate and important that this Court hold that the Port Authority's airport terminals are public fora, where distri-

bution of newspapers and other literature will remain fully proected by the First Amendment, subject to appropriate time, place or manner restrictions.

A. Non-Subscription, Single-Copy Newspaper Distribution at Airports is Crucial to Amici

Amici circulate newspapers in significant part through single-copy distribution. Their ability to do so is critically dependent upon the protections afforded them by the public forum doctrine.

Public streets and sidewalks are the most often cited examples of traditional public fora. In large measure, the "tradition" which is a principal characteristic of public fora is that of newspaper distribution. A presence on the public streets and sidewalks, for the purpose of distributing newspapers, antedates the Constitution.[1]

So-called "newsboys" aided in the distribution of patriotic literature during the Revolution.[2] The practice of selling newspapers on the public streets became more widespread during the 1830's with the development of a popular "penny press" which, unlike more established newspapers of the day, relied on street sales for the bulk of its distribution.[3] Before motorized transportation would revolutionize newspaper distribution, street hawkers were essential to the success of newspapers of every size.[4] Although there is no reliable way to estimate their numbers, from all accounts there were huge numbers of "newsies" on the streets and sidewalks in every sizeable

[1] Whisant, *Selling the Gospel News, Or: The Strange Career of Jimmy Brown the Newsboy*, 5 J. Soc. Hist. 269, 273 (1972); F. Mott, *American Journalism: A History 1690-1960* 106 (3d ed. 1967).

[2] A. Lee, *The Daily Newspaper in America: The Evolution of a Social Instrument* 26 (1937).

[3] M. Schudson, *Discovering the News: A Social History of American Newspapers* 22 (1981).

[4] D. Nasaw, *Children of the City* 168 (1985).

city.[5] In the larger cities, hawkers would place themselves outside department store exits, in front of subway stations, by commuter train stops, wherever they could be sure to meet with potential readers. In the words of one historian, "in those helterskelter days of journalism between the Spanish-American War and World War I, the newsies shouting the headlines were as much a part of the urban scene as the lampposts on every corner." [6]

Newsboys' shouts are now less common then they once were. Single-copy distribution in public fora, however, has increased. Most American readers now have access to more than one newspaper, even though the number of metropolitan daily newspapers has seriously declined. More and more readers have turned to single-copy purchases, rather than obtain their newspapers through home subscription. Readers have done so for varied reasons, with access, convenience, and flexibility being chief among them.

Thus those who read newspapers increasingly tend to read more than one. Most readers buy that second newspaper directly, not by subscription. Single-copy sales have accordingly become the most important means of circulation for newspapers seeking to become a "second read," as well as for those readers who, because of choice or lack of opportunity, do not have home delivery.[7]

Other factors also contribute to a trend away from regular subscriptions and an increasing popularity of single-copy purchases. Urban commuters find it easier to

[5] *See id.* at 69-71; *L. Ashby, Saving the Waifs: Reformers and Dependent Children, 1890-1917* 253 n.4 (1984).

[6] D. Nasaw, *supra* note 4, at 78.

[7] Daily home delivery falls below the 50% mark for a number of demographic groups, including those with family incomes below $10,000, the unmarried, renters, and those under 30. *See* Newspaper Advertising Bureau, Inc., *Circulation and Home Delivery Patterns* (Nov. 1983).

buy a newspaper at or on the way to work, or simply defer reading a newspaper until they return home in the evening. Young adults tend to be more eclectic than their elders when purchasing newspapers. For those who do not read a newspaper every day, single-copy purchasing is more efficient: some buy the newspaper only on Wednesdays, when food coupons are included; on Fridays, for the weekend entertainment edition; or daily, depending on which alternative publication they wish to read. For these buyers, the convenience of home subscription (when it is available) does not offset the flexibility of choosing when and what newspaper to read.[8]

Finally, some readers buy newspapers only when newsworthy events draw their attention. Major news developments lead directly to intensified reader interest and increased single-copy purchases. For example, USA TODAY sold 640,185 more copies the day after the Persian Gulf War started than had been sold on the same day the week before. Most of *amici's* newspapers also increase their next-day sales after, for example, elections or significant sports events.

Single-copy newspaper sales are accordingly crucial to the survival of newspapers. Newspapers with circulations in excess of 200,000 sell 34% of their papers to single-copy purchasers. For most papers with circulations of 500,000 and above, the percentage of single-copy purchases is even higher: single copy buyers of USA TODAY, for example, represented 53.15% of the newspaper's 1.9 million daily purchasers in 1991.[9]

As air travel has mushroomed, single-copy newspaper distribution—itself a central characteristic of public fora

[8] W. Thorn & M. Pfeil, *Newspaper Circulation: Marketing the News* 271-72 (1987); "Single Copy Sales," *Presstime* 6 (July 1984).

[9] *See* International Circulation Managers Association, *ICMA Update*, June 1991; American Newspaper Publishers Association, *Executive Summary: Creative Marketing Strategies* 1 (Oct. 1986).

—has evolved such that airport circulation has assumed ever-increasing importance to *amici* and their readers. Once citizens simply bought their newspaper from a newsboy as they walked down the street or sidewalk. Later, commuters picked up their daily paper at rail stations or bus stops to read on the bus or train. Now they do so at the airport: considerable numbers of the millions and millions of travelers who annually pass through the Port Authority's three airport terminals buy a newspaper to read on the plane, to read while waiting for a plane or for an arriving passenger, to learn about local events or breaking news on their arrival, or to read as part of their ordinary daily routine as one of the airports' thousands of employees.

Port Authority argues that growth in air travel, with its attendant crowding of airports, counsels a finding that airports are not public fora. Cross-Petition for Writ of Certiorari at 16. To the contrary, that same explosive growth in air travel confirms the critical importance of airport terminals as sites for the distribution of newspapers. For example, fourteen million people annually buy USA TODAY at airports, a figure that represents 5.5% of its total annual sales.

The greater the numbers of people who pass through airports and airport terminals as part of their daily life, the greater their need and desire to be supplied there with timely news and information.[10] Newspapers should continue to have the constitutional ability to meet that need, protected by the public forum doctrine.

[10] For large numbers of travelers, particularly those who are simply changing planes, the airport terminal is the only location at which they can purchase a local newspaper. For example, 55% of the millions of passengers in Dallas-Fort Worth airport transfer from one plane to another, *Fernandes v. Limmer*, 663 F.2d 619, 624 n.4 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1121 (1982), and thus have no practical ability to leave the terminal to buy a newspaper.

There is no question that airports may, and have, imposed appropriate time, place and manner regulations to ensure that congestion problems, safety hazards, and other compelling airport needs are met. *Amici* make every effort to balance airports' legitimate interests with their own need to reach their readers, and have safely, successfully and without controversy achieved that accommodation at the vast majority of the nation's 483 air traffic "hubs" and "nonhubs." *Amici* claim no First Amendment right, for example, to block the flow of passengers in a crowded airport corridor in order to distribute a newspaper. Airports are, however, fully capable of achieving their legitimate operational objectives through appropriate time, place and manner regulations, tailored to the special needs of particular airport facilities: the "character [of the airport] may well inform the application of the relevant test, but it does not lead to a different test." *Frisby v. Schultz*, 487 U.S. 474, 481 (1988).

B. Airport Terminals are Contemporary "Streets and Sidewalks"

Travelers boarded airplanes more than 438,000,000 times in 1990. According to the FAA, that passenger volume will increase by 3.8 percent annually over the next ten years.[11] The numbers at the Port Authority airports are similar: 79,000,000 travelers in 1986, with an anticipated 110,000,000 travelers by 2000. Cross Petition for Writ of Certiorari at 4.

Today's town square or city park may be deserted, but the airport almost never is. As airports have increased in size and sociological significance, their terminals have assumed the functional and physical characteristics of streets and sidewalks and have become the contemporary public forum: open, public thoroughfares surrounded by

[11] FAA, U.S. Dep't of Transportation, Pub. No. FAA-APO 91-1, *FAA Aviation Forecasts: Fiscal Years 1991-2002*, at 7 (Feb. 1991).

diverse commercial activities and peopled by members of a community carrying on business and personal activities of every description.

> [T]he open, public areas . . . have become contemporary crossroads in which millions of people each year engage in a considerable amount of commercial, social and political interchange.

U.S. S.W. Africa/Namibia Trade and Cultural Council v. U.S., 708 F.2d 760, 774 (D.C. Cir. 1983).

Airport managers once had only to support flights with baggage, fuel and the sparest of passenger conveniences; not a small task, but nonetheless one that focused on flight operations. Now airports, including those of the Port Authority, have become large commercial centers;[12] they have expanded and diversified their facilities to meet public demands wholly distinct from the need to board a plane.

Airports engage in sophisticated marketing research to maximize the commercial potential of the population which daily passes through them.[13] Joining the traditional barber shops, post offices, and travel bureaus are specialty gift shops and even department stores: in 1986, two Bloomingdale's outlets opened at the Port Authority's JFK Airport.[14] The diversity of commercial activity along airport corridors and thoroughfares mirrors the range of activity on any public street: the ubiquitous airport McDonalds, Pizza Huts and Burger Kings are joined, for example, by the more idiosyncratic slot machines in Reno, and USO facilities in Philadelphia.

[12] Parr, "*We enterprised it*," *Forbes*, Nov. 16, 1987, at 302.

[13] Vyn, "Airports Sold on Marketing to Building Concession Projects," *Marketing News*, June 5, 1989, at 2.

[14] Ralston, "Airport Retailing Takes Off," *Venture*, May 1988, at 38.

This wide range of activities inside airport facilities has nothing to do with making flights more safe or guaranteeing their on-time operation. It results instead from airport managers recognizing what their counterparts—other business people abutting other public sidewalks and thoroughfares—recognized long ago: pedestrians have money and are willing to spend it.[15]

Of course most airports are still situated many miles from the population centers they serve, but they are not isolated (as suggested by the majority below) any more than any other suburban commercial center is "isolated" from the inner city. For many (if not most) travellers, the large airport terminal presents the only practical location at which to shop for local products. Thus airports have encouraged stores selling "local flavor, local products, and businesses offering innovative services that make passengers' time in the terminal seem less interminable," [16] such as an airport Texas barbecue eatery in Dallas, a lobster-to-go stand in Boston,[17] or an Ozark handcrafts store in St. Louis.[18] The core elements of the downtown community have simply moved, or expanded, to the airport terminal.

Clearly the large airport no longer merely supplies food, rest stops and telephones, or simply gets planes off the ground.[19] Passengers who have to wait an hour or two for their plane want all of the services and amenities they can get, "to transact more business while they have this time—and they want to read, eat and watch

[15] Parr, *supra* note 12, at 298.

[16] Ralston, *supra* note 14, at 38.

[17] *Id.* at 39.

[18] Dunkin, "Airport Shopping Gets an Upgrade to First Class," *Business Week*, March 6, 1989, at 55.

[19] Finney, "The New Appetite for Airport Food," *Airport Magazine*, July/August 1991, at 12.

television." [20] Passengers provide a key airport marketing opportunity, but are only part of the population at the airport. Airports also seek retail business from those accompanying passengers: "these meeters and greeters often have a lot of time to kill, while the passenger checks in or gets his luggage." [21]

C. First Amendment Activities are Characteristic of Airports

The diverse range of airport enterprises also typically includes a wide array of expressive activities. All major airports welcome bookstores and newsstands at which books, magazines, newspapers and other periodicals are sold. Major terminals contain display advertising and permit the distribution of pamphlets, advertising materials, and public interest publications. Some airports actually publish news and information themselves. For example, Metropolitan Washington Airports Authority has its own airport community magazine, *The Washington Flyer*. Newark International Airport also has its own newsletter, the *Newark Int'l Airport Beacon*, which is distributed in its public areas and is addressed primarily to its 11,000 employees. The *Beacon* includes news, poetry, artwork and classified advertising, and serves as a forum for discussing public issues such as the problem of aircraft noise [22] or the problem of the homeless at the airport.[23] The Port Authority also publicly distributes *Flying Times*, a newsletter in which the Newark International Airport Manager himself recognized that Newark airport is a self-contained:

[20] Gite, "Your Ticket to High-Flying Profits," *Black Enterprise*, March 1991, at 58.

[21] Vyn, *supra* note 13, at 2.

[22] *Newark Int'l Airport Beacon*, April/May 1988, at 1.

[23] *Newark Int'l Airport Beacon*, June/July 1988, at 1.

> community with all the functions, the friendships and the opportunities that that implies. [Newark International Airport] is like your hometown. —We have a bank, a pharmacy, a barbershop and a lot of people pulling together to make it all work. [Newark International] is also part of the communities that surround it. Over the last 60 years, these communities and the airport have grown together. The airport has become an important economic anchor, generating jobs, new business and above all, opportunities.

The Port Authority of N.Y. and N.J., *Flying Times*, Vol. 4, No. 4, at 1 (1988).

Thus it is that major municipal airports are themselves communities, with all the characteristics of downtown retail areas. Indeed, they have in many respects supplanted the downtown streets and parks—now frequently deserted and dangerous, and available for speech only theoretically—as appopriate fora for free expression. Airports are major commercial crossroads, where the streets, highways and pathways on the ground intersect with the "highways of the air." As "society becomes more insular in character, it becomes essential to protect public places where traditional modes of speech and forms of expression can take place." *United States v. Kokinda*, 110 S. Ct. 3115, 3125 (1990) (Kennedy, J., concurring in judgment).

D. The Port Authority Air Terminals are Traditional Public Fora

In *United States v. Kokinda*, *supra*, the plurality concluded that the "purpose" of a public facility "is critical in determining whether" it is a public forum. *United States v. Kokinda*, *supra*, 110 S. Ct. at 3121. The Port Authority accordingly argues that airports are not public fora because their "sole purpose is to facilitate air travel." Cross-Petition for Writ of Certiorari at 5.

The Port Authority's interpretation of *Kokinda* would, of course, support an equivalent claim that sidewalks are not public fora because their "sole purpose is to facilitate foot travel" or that streets are not public fora because their "sole purpose is to facilitate vehicular travel." In that regard, then, the Port Authority misreads the plurality's rationale in *Kokinda*.

The terminals at issue in this case are public passageways, to which access is unrestricted and through which citizens pass to eat, to shop, to spend time watching planes (or people) come and go, to fill prescriptions, or to do myriad other things in addition to travelling beyond the airport. *See Chicago Area Military Project v. City of Chicago*, 508 F.2d 921, 925 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975). Unlike those who traversed the special purpose post office sidewalk in *Kokinda*, those who visit major air terminals do so for a host of different reasons, not "solely" to get on or off a plane.

Moreover, in *Kokinda* the reason for *travel* upon the postal sidewalk was itself for a narrow and specific purpose: the sidewalk existed "solely to assist" access to the Post Office to transact postal business, *not* to "facilitate the daily commerce and life of the neighborhood or city." *United States v. Kokinda*, *supra*, 110 S. Ct. at 3120. To the contrary, people who travel to, from or through the Port Authority's airport terminals do so as an indispensable part of the "daily commerce and life" of New York City; they travel not solely to transact postal business but to engage in the entire spectrum of personal and business activities, both at the airport terminals and beyond.[21] *Kokinda*, then, simply cannot be read to support the conclusion that the terminals are not public fora.

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[21] In fact, the statutory purpose of the Port Authority's air terminals is set out in extraordinarily expansive terms, *i.e.* Port Authority air terminals are established "for the benefit of the people of the states of New York and New Jersey," "for the increase of their commerce and prosperity, and for the improvement of their health and living conditions." N.Y. Unconsol. Laws

Amici do not claim that all airport terminals are public fora. A sidewalk may not, because of its location and purpose, be a public forum for speech because it is located on a military base, *Greer v. Spock*, 424 U.S. 828, 838 (1976), or within a postal facility, *United States v. Kokinda*, *supra*. Similarly, some air terminals located on military bases, *see United States v. Albertini*, 472 U.S. 675 (1985), or the special purpose Memphis Federal Express terminal (and its counterpart run by the United States Post Office), would presumably not be public fora because of their distinctive location and narrow purpose. Yet here, where access to airport terminal thoroughfares and passageways is unrestricted, where those passageways abut expressive and commercial activities of a range far beyond those which abut most American streets and sidewalks, where thousands and thousands of people daily congregate, and through which all walks of people travel for wholly unrestricted purposes, the terminal is "clearly held in trust, either by tradition or recent convention, for the use of citizens at large." *Members of the City Council v. Taxpayers for Vincent*, 446 U.S. 789, 815 n.32 (1984). Most assuredly the exercise of First Amendment freedoms is protected in the Port Authority's terminals by the public forum doctrine, for expressive activities are fundamentally compatible with the normal daily activities undertaken there, and can be accommodated to the airports' legitimate needs through appropriate time, place or manner regulations. *See Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).

CONCLUSION

The court below held that the Port Authority's ban on the distribution of literature (as distinct from in person solicitation) in its air terminals was unconstitu-

§ 6634 (McKinney 1979 & Supp. 1992); N.J. Stat. Ann. § 32:1-35.4 (West 1990 & Supp. 1991).

tional. *Amici* urge this Court not only to uphold the conclusion that the distribution of literature in the Port Authority terminals is appropriate, but also to hold that the Port Authority terminals are traditional public fora, in which First Amendment activities may be limited only by appropriate time, place and manner restrictions. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

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